

Remarks

This Communication is in response to the Office Action dated **January 6, 2010**. The Office Action rejected claims 1-6, 9-12, 15, 16, 18-21, 24-26, 31-35, 38-41, 47-55, 59-64, 79, 82, 85, 88, and 91 under 35 USC § 103(a) over Nunez (US 5,800,514) in view of Yachia (US Pub. No. 2004/0093065), Liebig (US 4,517,687), and Koch (US 4,892,539) and rejected claim 30 under 35 USC § 103(a) over Nunez in view of Yachia, Liebig, and Koch (US 4,892,539) in further view of De Paulis (US 6,352,554).

In light of the following comments, Applicant requests reconsideration.

Claim Rejections – Section 103

Claims 1-6, 9-12, 15, 16, 18-21, 24-26, 31-35, 38-41, 47-55, 59-64, 79, 82, 85, 88, and 91

The rejection of claims 1-6, 9-12, 15, 16, 18-21, 24-26, 31-35, 38-41, 47-55, 59-64, 79, 82, 85, 88, and 91 over Nunez, Yachia, Liebig, and Koch is *traversed*.

In rejecting the aforementioned claims over Nunez, Yachia, Liebig, and Koch, on page 2, the Office Action asserts:

Applicant argues that the Nunez '514 states a maximum of three warp yarns for two filling picks and argues the amendment of more than three warp yarns is not obvious over Nunez's disclosure. However, it must be noted that when the claimed range and the prior art range are very similarly [sic] (i.e., more than 3 and up to 3) the range of the prior art established *prima facie* obviousness because one of ordinary skill in the art would have expected the similar ranges to have the same properties.

Applicant disagrees. Based on the disclosure of Nunez, one of ordinary skill in the art would not expect "similar ranges to have the same properties," as the Office Action alleges. Indeed, as discussed in Applicant's Amendment of October 26, 2009, Nunez states, "[i]t has been determined that a void greater than the diameter of about three warp yarns results in a graft with a porosity which is unacceptable as a fluid-tight conduit and may be incapable of sufficiently maintaining blood pressure therein." Column 9, lines 63-67. In other words, as stated by Nunez, "the transition from a graft section of one diameter to a graft section of another diameter must be accomplished in fluid-tight applications without creating such voids between the contiguous weave sections which are generally greater than the diameter of three warp yarns." *Id* at column 9, line 67-column 10, line 5. Thus, in light of the disclosure of Nunez, one of ordinary skill in the

art would not expect a graft having “an increased number of warp yarns at the rate of greater than three warp yarns for every two of said fill yarns . . .” to have the “same properties” as that of Nunez.

In addition, Applicant does not acquiesce to the validity of the Office Action’s assertion that “one of ordinary skill in the art is highly skilled in the textile manufacturing such that optimizing warp yarns only involves routine skill in the process of weaving.” Page 2. This assertion is inconsistent on its face. One of ordinary skill in the art, by definition, is not one that is highly skilled. Pursuant to MPEP § 2141(II)(C):

The person of ordinary skill in the art is a hypothetical person who is presumed to have known the relevant art at the time of the invention. Factors that may be considered in determining the level of ordinary skill in the art may include: (1) "type of problems encountered in the art;" (2) "prior art solutions to those problems;" (3) "rapidity with which innovations are made;" (4) "sophistication of the technology; and" (5) "educational level of active workers in the field. In a given case, every factor may not be present, and one or more factors may predominate." *In re GPAC*, 57 F.3d 1573, 1579, 35 USPQ2d 1116, 1121 (Fed. Cir. 1995); *Custom Accessories, Inc. v. Jeffrey-Allan Industries, Inc.*, 807 F.2d 955, 962, 1 USPQ2d 1196, 1201 (Fed. Cir. 1986); *Environmental Designs, Ltd. V. Union Oil Co.*, 713 F.2d 693, 696, 218 USPQ 865, 868 (Fed. Cir. 1983).

In making the above assertion, the Office Action has not addressed any of the factors outlined in MPEP § 2141(II)(C). Moreover, the Office Action provides no facts in support of the assertion that “optimizing warp yarns only involves routine skill . . .” In light of the foregoing, it is unclear what standard the Office Action is applying in rejecting the immediate claims.

With regard to the Office Action’s statements on page 2 concerning the drawings, it is unclear to Applicant whether the Office Action is objecting to the drawings or pointing to the drawings in an effort to reject the claims. Applicant further requests that any objections be made explicit. Moreover, in the event that the Office Action is objecting to the drawings,¹ Applicant should be afforded an opportunity to respond to such an objection in a non-final action. Applicant notes that Applicant’s previous amendments did not relate to the “claimed crimp sections.”

¹ It does not appear that the Office Action is objecting to the drawings since the Office Action has not used the words “object” or “objected.”

Amendments regarding the “claimed crimp sections” were submitted in a previous response of June 10, 2009. In addition, it is noted that claims 27-29 and 44-46 (now canceled) recited crimps in their as-filed state. In other words, the “claimed crimp sections” have been pending in claims since the filing of the Application. Therefore, in the event that the Office wishes Applicant to submit new drawings, Applicant should be afforded the opportunity to respond to such a request in a non-final Action. *See* MPEP 706.07(a).

Notwithstanding the foregoing, the claimed subject matter would be abundantly clear to one of ordinary skill in the art in light of Applicant’s drawings and Specification in their current form. As such, Applicant incorporates by reference the arguments submitted in Applicant’s previous response. Specifically, the Office Action’s rejection does not explain why one of ordinary skill would be led to provide crimps only on a bulbous section while leaving ends free from crimping, for example. *See, e.g.*, claim 1 and pages 14-16 of Applicant’s response dated October 26, 2009; *see also* claim 32. Consequently, the Office Action has failed to articulate a *prima facie* case of obviousness.

Turning to the Office Action’s remarks regarding Koch, the Office Action asserts:

Applicants also allege that the teaching of Koch does not suggest different patterns along the body of the vascular structure, but admits that they are two different patterns, just located internally and externally. The Examiner would like to point out that the claims only recite different patterns along the length but do exclude the possibility of having different weaves applied as layers taught by Koch. The use of comprising language does not exclude the fact that different weaves can be applied as layers. Therefore the suggested combination, establishes the sections having the different patterns as claimed but include both, not excluded by the claims. It would be more clear if the language conveyed that the weave patterns somehow were in the same plane or to that extent.

Applicant disagrees. As noted in Applicant’s previous response, which is herein incorporated by reference, Koch discloses a “woven velour synthetic tubular graft . . . having a velour structure as its outer and a plain weave as its inner surface.” Koch, column 1, lines 50-54.

Koch further states, “differentiation between the inner surface (plain weave) and the outer velour surface is accomplished by having the filling yarn interlacing with the warp yarns at different patterns preferably every other pick.” Column 1, lines 56-59. In this regard, and with reference to figures 1 and 2, below, Koch explains:

In FIG. 1 the warp yarns are shown at 20-1 and the fill yarn is shown having portions 20-2 and 20-3. Fill yarn portion 20-2 is shown in a plain weave pattern with the fill yarn interlacing with the warp yarns as shown in an under and over plain weave fashion. The velour in the fabric is formed by interlacing of the fill yarn portion 20-3 which forms a velour pattern having outside loops 20-4 which float (extend) over five warp yarn ends 20-1 as shown.

Column 2, lines 57-65. Based on the disclosure of Koch, it appears that Koch uses the term “pattern” to refer to (1) the weave pattern, wherein (as shown in FIG. 1) the yarn portion 20-2 is disposed in an under and over fashion, *id* at 61-62, or (2) to refer to the velour pattern, wherein (as shown in FIG. 1) the yarn portion 20-3 extends over five successive warp yarns and then under one warp yarn. *Id* at column 2, line 62 – column 3, line 9.

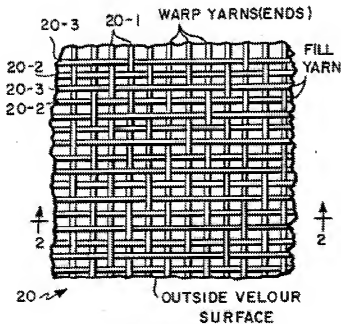


FIG. 1



Despite Koch's use of yarn portions 20-2 and 20-3, nothing in Koch teaches or suggests a “woven pattern of said bulbous woven section being different from said woven pattern of said first and second tubular ends . . . ,” for example as claimed in claim 1. To the contrary, the

pattern of Koch (having yarn portion(s) 20-2 and 20-3) appears to extend the entire length of the graft.

In sum, none of Nunez, Yachia, Liebig, or Koch, whether considered in dependently or in combination, teaches or suggests what is claimed in independent claims 1, 32, 49, and 79 and the Office Action has failed to establish a *prima facie* case of obviousness at least with respect to these independent claims. Consequently, Applicant requests withdrawal of the rejections of claims 1-6, 9-12, 15, 16, 18-21, 24-26, 31-35, 38-41, 47-55, 59-64, 79, 82, 85, 88, and 91.

With further regard to independent claim 79, claim 79 recites, in-part:

said woven pattern of said bulbous woven portion comprises a terry weave and said woven pattern of said first and third hollow tubular woven portions comprises a woven pattern selected from the group consisting of a plain weave, basket weave, twill weave, velour weave, double velour weave, satin weave, and combinations thereof.

Applicant is unable to find any reference to this language of claim 79 in the rejection thereof. As stated in MPEP § 2142:

[t]he Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that “rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

In addition, Applicant notes the requirements of 37 CFR § 1.104(b) (indicating that the “action will be complete as to all matters”); *see also* 37 CFR 1.104(c)(2). The Office Action has not provided articulated reasoning in rejecting claim 79 and Applicant requests withdrawal of the rejection of claim 79 and dependent claim 91 depending therefrom.

Claim 30

The Office Action rejected dependent claim 30 under 35 USC § 103(a) over Nunez in view of Yachia, Liebig, and Koch in further view of De Paulis. This rejection is *traversed*.

As noted in Applicant's previous response, claim 30 depends from claim 1 and De Paulis does not remedy the deficiencies of Nunez, Yachia, Liebig, and Koch. As such, Applicant requests withdrawal of the rejection of dependent claim 30.

Conclusion

Based on at least the foregoing remarks, Applicant requests withdrawal of the rejections and allowance of claims 1-6, 9-12, 15, 16, 18-21, 24-26, 30-35, 38-41, 47-55, 59-64, 79, 82, 85, 88, and 91. Favorable consideration and prompt allowance of these claims is earnestly solicited.

Should the Examiner believe that anything further would be desirable in order to place this application in better condition for allowance the Examiner is invited to contact Applicant's undersigned representative at the telephone number listed below.

Respectfully submitted,

VIDAS, ARRETT & STEINKRAUS

Date: February 22, 2010

By: /James M. Urzedowski/

James M. Urzedowski

Registration No.: 48596

6640 Shady Oak Rd., Suite 400
Eden Prairie, MN 55344-7834
Telephone: (952) 563-3000
Facsimile: (952) 563-3001